neur's case is against the raising of necessity as a general defence. It was generally thought that the law ought not to afford a defence in such a case.

However, in certain circumstances, where a person is able to choose between two courses, one of which involves breaking the criminal law, and the other some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law, the court would temper such situation with justice.

Instances of these are:

In a storm at sea, the cargo may be jettisoned for the safety of passengers. — See *Mouse's* case.[6] There is a right to land on the shore (even where it would otherwise be a trespass) in cases of peril or necessity. — See *Halsbury's* Laws of England, 3rd edition, xxxix 564. Specifically the defence of necessity can be recognized during emergency, so specific in character that the acceptance of the defence does not imperil the general rule. — See *Glanville Williams* on Criminal Law 1978, 557. In an American case, the master of a ship was held not guilty of violating an embargo act by illegal entry into a Port when, as the result of storms, this course was "necessary" for the preservation of the vessel and the cargo and lives of those on board. — See *William Gray.*[7]

In the present case, I am of the view that out of necessity it justified the respondents to enter the Malaysian waters on specific reasons that the boat in which they were travelling was in distress due to the fact that the rudder of the boat was broken in International waters. In those circumstances it would be necessary for the respondents to seek shelter for the safety of the boat and to preserve the lives of the crew during such distress. In that situation it would be far fetched to imagine that the respondents would have to obtain permission of the Director-General under section 49(1) and (2) of the Customs Act for carrying the tin-ores which were not destined nor intended for export from Malaysia. Even assuming that a charge under section 49(1) of the Customs Act, in the present case is one of strict liability, following *Public Prosecutor* v. *Koo Cheh Yew & Anor.*, it may be construed that *mens rea* or guilty mind of the respondents was not present when the offence was alleged to have been committed.

In this event, the appeal is dismissed and for different reasons, the Magistrate's order in respect of the boat and the goods is confirmed.

Appeal dismissed.

Solicitors: *R. K. Menon & Co.*

MOHAMMAD BIN BUYONG v. PEMUNGUT HASIL TANAH GOMBAK & ORS.

[A.C.J. (Hashim Yeop A. Sani J.) November 30, 1981]
[Kuala Lumpur — Originating Motion No. A 16 of 1980]

Land Law — Registration of instrument — What constitutes — Power of Collector to cancel or delete entry in register — Power of Collector to register instrument although prior instrument has been presented — National Land Code, 1965, ss. 217(2), 298, 300, 304, 340, 380 & 382.

In this case a transfer form 14A was submitted to the Land Office, Gombak by the appellant. The form was signed by one Misriah binte Amirin claiming to be the attorney of the second respondent. When Form 14A was presented it was accompanied by an office copy of a document purporting to be a power of attorney but not the original issue document of title. Despite the non-production of the original issue document of title the presentation was recorded in the presentation book of the land office. Subsequently the land office received a letter from the second respondent stating that she never at any time gave a power of attorney to Misriah binte Amirin. The Collector considered the matter and decided to reject the instrument in accordance with section 298 of the National Land Code. Subsequently an application for transfer of the shares of the second respondent to the second, third and fourth respondents was received and registered by the Collector. The appellant appealed against the decision of the Collector.

Held: (1) in this case although the instrument of transfer to the appellant had been presented and recorded in the Presentation Book, it had not been registered and therefore the appellant cannot claim indefeasibility under section 340 of the National Land Code since the facts revealed that there was no registration;

(2) although there is no power of the Collector to alter or cancel a memorial, the entry in this case never acquired the sanctity of a memorial which under section 304(4) of the National Land Code was conclusive evidence of registration. Therefore it could properly be deleted or cancelled;

(3) although technically the act of the Collector in registering the instrument of transfer to the 2nd, 3rd and 4th respondents would appear to be in breach of section 300 of the National Land Code, the words "shall not register" appearing in section 300(1)(a) of the Code are on the facts of this case merely directory and not mandatory and the apparent failure of the Collector to comply with the section did not invalidate the registration.

Case referred to:-

(1) *Island and Peninsular Development Bhd. & Anor.* v. *Legal Adviser, Kedah* [1973] 2 M.L.J. 71.

ORIGINATING MOTION.

A. Krishnan for the appellant.

Abdul Malik bin Mohamed Salleh (Legal Adviser, Selangor) for the 1st respondent.

Zainuddin bin Ismail for 2nd, 3rd & 4th respondents.

Hashim Yeop A. Sani J.: This is an appeal under section 418 of the National Land Code against the decision of the Collector of Land Revenue, Gombak. The decision involved two transactions over the undivided shares of the second respondent in land EMR. 4512 Lot No. 3516 in the Mukim of Setapak.

The facts leading up to the appeal may be briefly stated as follows. On August 14, 1979 a transfer Form 14A was submitted to the Land Office Gombak by the appellant. The form was signed by one Misriah binte Amirin claiming to be the attorney of the second respondent as transferor and the appellant as transferee of 12/19 shares in the said land for a consideration of $50,000. When Form 14A was pre-

sented it was also accompanied by an office copy of a document purporting to be the power of attorney. The photostat copy of the document shows, however, that it was not signed by the second respondent although it carries the signature of one Sarathy, Commissioner for Oath, Kuala Lumpur as witness. The photostat copy also carries the endorsement of the Senior Assistant Registrar, High Court, Kuala Lumpur certifying it as an office copy and that a true copy had been deposited at the High Court Kuala Lumpur with registration No. 1139/79.

When the appellant presented Form 14A to the Land Office with the office copy of the purported power of attorney mentioned earlier he did not however also produce the original issue document of title as required by section 284 of the National Land Code. It was only on September 27, 1979 that the appellant by statutory declaration claimed that the original issue document of title was lost while in his custody and he then applied for a fresh issue of document of title. Despite the non-production of the original issue document of title the presentation was recorded in the Presentation Book of the Land Office.

On November 20, 1979 the Land Office received a letter from the second respondent stating that she had never at any time appointed the said Misriah binti Amirin to be her attorney, and that any document purporting to give such power of attorney was "false" or "forged" — see copy of letter marked "KTAA 2" attached to affidavit of the Assistant Collector of Land Revenue, Gombak, affirmed on November 2, 1981.

After what he referred to as "thorough examination" of the documents presented by the appellant, the Collector found that the instrument Form 14A was not fit for registration and he rejected it. In his affidavit he said that he rejected the instrument in accordance with section 298 of the National Land Code on the grounds that:—

(a) The issue document of title was not presented with Form 14A;

(b) The power of attorney submitted was not signed by the donor and as such was an insufficient or void document.

It would appear that the following facts are not in dispute. It is not disputed that in the register document of title an entry was made on the purported transfer of the said 12/19 share of the said land to the appellant, but that the entry was subsequently cancelled with the word "Di-batalkan" written or printed across the entry. The cancellation was signed by the Collector but the entry was, however, not signed. The date of the cancellation was said to be at or about January 21, 1980. Therefore the entry was in the register for the period August 14, 1979 to January 21, 1980.

It is also not disputed that on January 4, 1980 the Collector received an application for a transfer of the undivided shares of the second respondent to the second, third and fourth respondents and that these transfers were duly registered by the Collector on the same date. In the memorial the shares of the second, third and fourth respondents are stated as 32/52, 15/52 and 5/52 respectively.

Let us now come to the arguments of the appellant. It is the contention of the appellant that he is the person lawfully entitled to the 12/19 shares of the said land by reason of the sale and purchase and in fact according to him he was the duly registered proprietor. It was also the contention of the appellant that the Collector had no power or authority or jurisdiction to cancel or delete the transfer which he considered to have been registered on August 14, 1979. As a consequence the appellant seeks to quash the decision of the Collector and also for a declaration that the subsequent registration on January 4, 1980 of the transfers of the undivided shares in the said land to the second, third and fourth respondents is bad and should be set aside.

What the appellant is claiming is in fact the protection of section 340 of the National Land Code. The doctrine carried in section 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Subsection (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired. This provision deals with what is called "deferred indefeasibility" about which we are not presently concerned.

There are as many side issues in this case as there are secondary questions that can be asked arising from the facts of this case. For example, was the document purporting to be the power of attorney void or insufficient within the meaning of section 340(2) of the Code being a document not executed by the donor. Then there is the question whether the title or interest in the land was thereby unlawfully acquired by the appellant. Was there fraud or misrepresentation in the transaction and by whom? Where an "office copy" of a power of attorney is presented together with Form 14A in accordance with section 309(1)(a) of the Code, as in this case, can the Collector go behind the document and require proof of due execution of the power of attorney? All these secondary questions need not be answered to determine this appeal. Looking at the facts narrated earlier the primary and basic question to be answered first is whether the appellant can invoke section 340 of the Code at all. In other words is the appellant entitled to the protection of section 340 of the Code? The crucial words in section 340 are "any person or body for the time being registered as proprietor of any land." It would seem clear that one has to be registered as proprietor first before one's title can be described as indefeasible. In other words, registration is a pre-requisite of indefeasibility.

What are the facts here? Here an entry was made in the register on the day that the transfer Form 14A together with the purported power of attorney were presented by the appellant. It was a bare entry. After that nothing happened. There is evidence that the Collector himself did not see the entry then. A thorough examination of the document involved was conducted by the Collector only after he

received the letter from the second respondent on November 20, 1979. Therefore it is clear on the facts that the entry made (probably by the clerk) on August 14, 1979 was a bare entry and it was never signed by the Collector.

How instruments are to be registered is provided by Cap. 4 Part Eighteen of the National Land Code. Section 304(2) provides the Registrar shall register any instrument by making a memorial "under his hand and seal."

David Wong in his book "Tenure and Land Dealings in the Malay States" at page 319 describes what amounts to registration. Every Torrens statute provides what constitutes the act of registration. Under the Malaysia National Land Code, it is "the making of a prescribed memorial of the dealing in the register document of title under the hand and seal of the registering authority." Therefore if any such memorial is made without the registering authority signing and sealing it or only under his hand and seal without the other, there would be no registration.

According to section 217(2) of the Code the undivided share of any land transferred shall pass and vest in the transferee only upon registration of the transfer. Therefore, my conclusion here is that the appellant cannot resort to section 340 of the Code since the facts clearly reveal that there was no registration.

The next question to be answered is whether the Collector was correct in law in cancelling or deleting the entry made in the register. The only power of the Collector or Registrar to correct errors in documents of title is contained in section 380 of the Code. Section 380 does not speak of cancellation or deletion. The words "cancellation" and "deletion", however, appear in section 382. Section 382(1) reads as follows:—

"On making any correction, deletion or cancellation pursuant to section 380 or 381, the Registrar shall endorse on the instrument in question a note under his hand and seal of the reason therefor and the date on which it was effected."

It is not absolutely clear what sort of corrections can be authorised by section 380. In *Island & Peninsular Development Bhd. & Anor.* v. *Legal Adviser, Kedah*[1] the High Court dealt with section 380(1)(a) of the Code and came to the conclusion that it is confined to an error or omission made by the Registry of Land Titles and does not extend to error or omission made by the parties concerned. David Wong admits that section 380 is not clear. But at page 398 of his book he said that the "error" referred to in section 380(1) may occur as a result of administrative or clerical mistake on the part of the Registrar or his staff but the paragraph is wide enough to include other circumstances in which such error may have been brought about.

Section 380(1)(b) provides that where the Registrar is satisfied that any memorial or other entry has been made in error on any document of title or any instrument relating to land he may make such corrections on the document as may be appropriate. To my mind section 380(1)(b) should at least be construed as wide enough to include any entry howsoever wrongly made by the Registry. *A fortiori* if the entry is a bare entry made by the clerk unsigned and unsealed by the Collector as in this case. There is no reason why the Collector cannot delete or cancel such an entry in the register.

Although the court should not construe section 380 so as to confer an unqualified power on the Registrar to correct or cancel an entry in the register which would strike at the very roots of indefeasibility of titles, the court should adopt a common sense attitude in a situation such as the present one. It is a correct statement of the law to say that there is no power of the Collector to alter or cancel a memorial for the moment a memorial is made the Collector is functus. But the entry made on August 14, 1979 never acquired the sanctity of a "memorial of registration" which under section 304(4) shall be conclusive evidence of registration. Therefore it could properly be deleted or cancelled.

The final question which needs to be answered in this appeal is whether the Collector acted unlawfully in registering the transfers on January 4, 1980 when the entry made in respect of the presentation by the appellant still remained uncancelled in the register. The section involved here is section 300 of the Code. That section provides that the Registrar shall not register any instrument until every instrument presented prior thereto in respect of the same interest has been either registered, rejected or withdrawn. It is not disputed here that the entry made was not cancelled or deleted until January 21, 1980. Therefore the registration purported to be made on January 4, 1980 would appear to be in breach of section 300. Technically, I think, the act of the Collector registering the instrument on January 4, 1980 was contrary to section 300. But in my view, the facts of this case should be considered as a whole. At the time when the instrument was presented to the Collector on January 4, 1980 he had already received the letter from the second respondent denying that she had given any power of attorney to any person. Thus on January 4, 1980 it cannot be said that the instrument presented by the appellant on August 14, 1979 was but for the non-production of the document of title otherwise fit for registration. Therefore in my opinion on the facts of this case the words "shall not register" appearing in section 300(1)(a) of the Code are merely directory and not mandatory and it is also my view that the apparent failure on the part of the Registrar to comply with this section does not invalidate the registration on January 4, 1980.

Based on the foregoing the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *James Foong & Co.; Tunku Zuhri, Manan & Abdullah.*